72-851

No.

IN THE

Supreme Court of the United States

October Term, 1972.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, Inc.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT, THE COUNTY OF ONEIDA, NEW YORK.

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THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the Oneida Tribe of Indians of Wisconsin, Inc.,

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v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT, THE COUNTY OF ONEIDA.

Questions Presented.

I. Does the "well-pleaded complaint" rule apply to the "arising under" language of 28 U. S. C. §1362?

II. Does an action which is basically a State action in ejectment present a Federal question albeit plaintiffs'

claim of right or title is founded on a Federal statute, patent or treaty?

Reasons for Denying the Writ.

I.

The jurisdictional issue in this case is the same under 28 U. S. C. §1331 and 28 U. S. C. §1362. Judge Friendly noted in the Court of Appeals Decision that:

> "Apart from the use of the same language as in §1331, the legislative history makes clear that the sole purpose of §1362 was to remove any requirement of jurisdictional amount. See 1966 U. S. Code Cong. & Adm. News 3145-49. The decision, *Poder v. Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, Mont.*, 339 F. 2d 360 (9 Cir. 1964), which the statute aimed to overrule, involved a claim that would have been assertable under §1331 but for the requirement of jurisdictional amount."

Taylor v. Anderson, 234 U. S. 74 (1914), is directly in point. The defendants in that case asserted ownership in themselves under a certain deed that was void under the legislation of Congress restricting alienation of lands alloted to the Choctaw and Chickasaw Indians. 234 U. S. at 74-75. This was held not to state a claim arising under the laws of the United States, since all that needed to be alleged was "that the plaintiffs were owners in fee and entitled to the possession; that the defendants had forcibly taken possession and were wrongfully keeping the plaintiffs out of possession, and that the latter were damaged thereby in the sum named." *Id.* at 74. The court noted that jurisdiction "must be determined from what necessarily appears in the plaintiff's statement of his own

claim in the bill or declaration, unaided by anything alleged in anticipation of *(sic)* avoidance of defenses which it is thought the defendant may interpose." *Id.* at 75-76.

If, then, the nature of petitioners' claim is such that relief is denied them in State Courts (25 U. S. C. 233 adopted in 1950, 64 Stat. 845); *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515 (1832), and in Federal Courts *(Taylor v. Anderson, supra)*, we respectfully suggest that petitioners look at Congress for relief rather than to the courts. Whatever rights are denied petitioners have been denied them by Congress and not by the courts. "When Congress has wished the States to exercise this power it has expressly granted them jurisdiction which *Worcester v. Georgia* had denied." 358 U. S. at 221.

In the opinion of the court below, Judge Friendly correctly points out:

> "Apparently it is based on the fact that although §11-a of the New York Indian Law, added by N. Y. Laws 1958, c. 400, apparently to implement 25 U. S. C. §233, is broad enough on its face to encompass an action like this, it may not be effective because of the proviso in the latter section restricting the grant of jurisdiction to New York courts so as to exclude land claims based on transactions or events antedating September 13, 1952. * * *—a matter on which we take no position. Even if the Oneidas' fears should be realized, we fail to understand how a state could be thought to have violated the Constitution in going only so far as federal law permits."

CONCLUSION.

Petitioners' writ of certiorari should be denied.

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